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No. 83-1709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHELDON STEIN,

Petitioner,

vs

ANGELO J. GAGLIARDO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On April 25, 1983, Respondent informed Petitioner by letter that Petitioner's Yellow Pages advertisement and the unsolicited mailing of the advertisement to Ms. Joanne Knapp may have violated the Code of Professional Responsibility. April 25, 1983 letter is reproduced at page A-19 in Petitioner's Appendix. Further communications occured between Petitioner and Respondent regarding compliance with the Code of Professional Responsibility on May 5, 1983, May 16, 1983, June 1, 1983 and June 3, 1983. Letters of May 5, 16, 1983 and June 1, 3, 1983 are reproduced at pages A-21 to A-31 in Petitioner's Appendix.

Prior to responding to the Disciplinary Counsel's request to withdraw the offending advertisement, the Petitioner on June 9, 1983 filed an action for a Temporary Restraining Order, Preliminary Injunction, Declaratory Judgment and a Writ of Prohibition in the U.S. District Court Northern District of Ohio Eastern Division. The District court by Order filed on June 24, 1983 dismissed Petitioner's action by invoking the doctrine of abstention as enunciated in *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed 2d 669 (1971) and *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed 2d 116 (1982). The District Court's Order is reproduced on Page A-2 in Petitioner's Appendix.

Petitioner through numerous communications was well aware that state disciplinary proceedings were pending and that filing of a formal complaint would be issued against Petitioner unless he agreed to withdraw his ad. A formal complaint was filed by Respondent before the Board of Commissioners on Grievances and Discipline on July 1, 1983, charging that Petitioner violated Disciplinary Rules (DR's) DR 2-103 (A); DR 2-102 (A) (2); DR 2-101 (B) (1); DR 2-105 (A); DR 2-104 (A) and DR 1-102 (A) (1). DR's 2-101, 2-103, 2-104, 2-105 are reproduced on Pages A 7 to A

16 of Petitioner's Appendix. DR's 1-102 and 2-102 are reproduced on pages A-1 to A-4 of Respondent's Appendix.

From the District Court's decision the Petitioner filed an appeal with the U.S. Court of Appeals for the Sixth Circuit. The Court of Appeals rendered its decision at the hearing from the bench under Rule 19 C which upheld the District Court's decision finding that no prejudicial error intervened in the judgment and proceedings in the District Court and ordered that the judgment of the District Court be affirmed.

ARGUMENT IN OPPOSITION TO GRANTING CERTIORARI

A. THE DECISIONS OF THE FEDERAL COURTS CORRECTLY APPLIED THE ABSTENTION DOCTRINE SINCE THERE WAS A STATE JUDICIAL PROCEEDING PENDING.

The Federal District Court correctly applied the principles of *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) and *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982) and dismissed Petitioner's action. In *Younger, supra,* the Supreme Court stated a strong federal policy of federal court abstention from interference with pending state judicial proceedings, absent extraordinary circumstances. The Federal Courts correctly found that there was no extra-ordinary circumstances which would warrant federal intervention.

The Federal District Court in dismissing the action found that the Ohio disciplinary procedure is a part of the ongoing judicial proceeding of the Ohio Supreme Court, *Coogan v. Cincinnati Bar Association,* 431 F. 2d 1209 (6th Cir. 1970).

The Federal District Court found that the important state interest is recognized in that the Ohio Constitution grants to the Ohio Supreme Court the jurisdiction to regulate the admissions of attorneys, enforce discipline among members of the bar, and in all other matters relating to the practice of law. *Article IV Sec. 2 (B) (1) (g)* Ohio Constitution. The State's interest is also demonstrated by the fact that the Disciplinary Counsel, Respondent, of the Supreme Court is named as a party.

The Federal District Court also determined that the third criteria was found in that there was an adequate opportunity in the state proceedings to raise constitutional questions. Once the Board of Commissioners on Grievances and Disci-

pline issues its report, the Supreme Court issues an order to show cause why the report should not be confirmed. When timely objections are filed the Court conducts a hearing wherein the attorney is given an opportunity to raise constitutional challenges. *Cleveland Bar Association v. Pleasant,* 167 Ohio St. 324, 148 N.E. 2d 493 (1958).

The Federal Court's decision was affirmed by the Court of Appeals which found that no prejudicial error intervened in the judgment and proceedings in the District Court.

Petitioner misstates the type of discipline which may occur in that Petitioner is subject only to disbarment. Such is not the case, the discipline that can be recommended by the Board of Commissioners can be public reprimand, one year suspension, indefinite suspension or disbarment. Furthermore the disciplinary action could be dismissed by the Panel or the Board.

Petitioner maintains that a state disciplinary proceeding is similar to a criminal proceeding, such is not the case. The proceeding is neither civil nor criminal but is sui generis, stemming from the inherent power of the Ohio Court to regulate the practice of law, *Ohio State Bar Association v. Weaver,* 41 Ohio St. 2d 97; 322 N.E. 2d 665 (1975).

CONCLUSION

Petitioner would ignore and have this Court ignore the sound reasoning and decision of the Federal District Court. The facts are that Petitioner has an adequate remedy in the state system, that disciplinary action was pending, a formal disciplinary complaint had been filed. The issue is now moot and Petitioner can raise his defense including constitutional challenges in the state proceeding.

The Federal District Court correctly determined that Disciplinary Counsel's position and actions were part of an ongoing state judicial proceeding and that therefore abstention was appropriate under the Younger and Middlesex County doctrine. The Sixth District U.S. Court of Appeals affirmed without opinion. The Petition should be denied.

Respectfully submitted,

/s/ Angelo J. Gagliardo
ANGELO J. GAGLIARDO
Counsel of Record
Disciplinary Counsel of the
Ohio Supreme Court

/s/ Carl J. Corletzi
CARL J. CORLETZI
Staff Counsel of Office of
Disciplinary Counsel

COUNSEL FOR RESPONDENT
ANGELO J. GAGLIARDO
DISCIPLINARY COUNSEL
OHIO SUPREME COURT

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon the Petitioner, Sheldon Stein, by forwarding such copies to the office of his Counsel, Jack M. Schulman, 748 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113-1727, by United States mail, first class postage prepaid, this 15th day of May, 1984. I further certify that all parties required to be served have been served.

/s/ Angelo J. Gagliardo
ANGELO J. GAGLIARDO
Counsel of Record for
Respondent

APPENDIX

OHIO CODE OF PROFESSIONAL RESPONSIBILITY
(Excerpts)
DISCIPLINARY RULES

DR 1-102 MISCONDUCT

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turitude [*sic*].

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 2-102 PROFESSIONAL NOTICES, LETTERHEADS AND OFFICES

(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his address, telephone numbers, the name of his law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification.

(2) A brief professional announcement card stating new or changed associations or ad-

dresses, change of firm name, or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm associates, and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more lawyers in the firm, except that the name of a professional corporation or professional association or legal clinic may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

(C) A lawyer shall not hold himself out has having a partnership with one or more lawyers or professional corporations unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional

card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

(F) Nothing contained herein shall prohibit a lawyer from using or permitting the use, in connection with his name, of any earned degree or title derived therefrom indicating his training in the law.

(G) A legal clinic operated by one or more lawyers may be organized by said lawyer or lawyers for the purpose of providing standardized and multiple legal services. The name of the law office shall consist only of the names of one or more of the active practitioners in such organization, and may include the phrase "legal clinic" or words of similar import. The use of a trade name or geographical or other type of identification or description is prohibited. The name of any active practitioner in such clinic may be retained in the name of the legal clinic after his death, retirement or inactivity because of age or disability, and the name must otherwise conform to other provisions of the Code of Professional Responsibility and the Supreme Court Rules for the Government of the Bar of Ohio. The legal clinic cannot be owned by, nor can profits or losses be shared with, non-attorneys or attorneys who are not actively engaged in the practice of law in such organization.

OHIO CONSTITUTION ARTICLE IV SEC. 2

§ 2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B)(1) the supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended May 7, 1968.)